United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4120

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROGER INNOCENT,

Petitioner,

-v-

Docket No. 76-4120

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

ISSUES PRESENTED

I. Whether the determination of voluntary departure for petitioner in the 1971 hearing was Res Judicata of the issue in the 1975 hearing, the scope of which was limited to the entertaining of a Section 243(h) application for a stay of deportation;

(a) Whether the Immigration Judge ("IJ") abused

his discretion with respect to the scope of the 1975 hearing;

(b) Whether the conduct of the IJ amounted to a "subtle coercion" directed against the petitioner to forego his right of appeal and hence is a due process abuse of discretion.

II. Whether the standard of substantial evidence was only intended as a review test for the basis of denials of discretionary relief by the Immigration and Naturalization Service,("INS").

III. Whether the IJ's denial of a stay on petitioner's 243(h) claim, on the sole ground of disbelief was not supported by substantial evidence and therefore constitutes an abuse of discretion.

STATEMENT OF THE CASE

This petition has been brought to review a final determination of deportation by the Immigration and Naturalization Service ("INS"). Jurisdiction of this Court is invoked under 8 U.S.C.A. 1105(a). Following a deportation

hearing held on June 20, 1973 (R. 14a - 35a) the IJ rendered his decision. Petitioner applied for temporary withholding of deportation pursuant to 8 U.S.C. 1253(a). The IJ denied this application and entered an order of deportation against petitioner with no provision for voluntary departure. The order of the IJ was affirmed by a decision of the Board of Immigration Appeals ("BIA"), dated and entered April 22, 1976. (R. 2a - 3a).

The instant petition for review followed.

STATEMENT OF FACTS

Petitioner, Roger Innocent, is a native and citizen of the country of Haiti. He was born on October 22, 1921 and is nearly 55 years of age. He last entered the United States at the border between Canada and New York on January 21, 1971 (R. 48a). At that time he did not present himself for inspection. A deportation hearing on February 22, 1971 was held and petitioner was found deportable and granted the privilege of voluntary departure (R. 49a - 50a). Further, an order was entered,

that if the country of France refused to accept the petitioner, the proceedings would be remanded to the IJ for further proceedings and receipt of an application under Section 243(h) with regard to the alternate designation of Haiti (R. 50a). On July 26, 1972 the District Director of New York, Maurice Kiley, sent a letter to the Department of State, Office of Refugee and Migration Affairs, Washington, D.C. for an advisory opinion on the question of political asylum for Mr. Innocent (R. 45a - 46a). The reply of the Department of State was received on September 21, 1972 with the negative response that it was not recommended that petitioner's request for asylum be granted (R. 47a).

At the hearing on June 20, 1973 after all parties were ready, the hearing was continued on the application for 243(h) relief (R. 14a).

The petitioner testified to the following: that if he were to return to Haiti it would be like a sentence of death by execution. He testified that in June of 1958 he, his father, and his brothers were all followers of presidential candidate, Jumelle, and his party. His father was later arrested and

put in prison and after four months in prison, he subsequently died. That his brother had also been arrested and put in prison and had never been heard of again. That the petitioner himself had to go into hiding in the mountains from where he continued to work against Duvalier going out at nights and giving out pamphlets directed against the Duvalier regime. Petitioner further testified that he felt he was in constant danger, that he could no longer stay in Haiti, especially after the attempted coup d'etat on the presidential palace in April, 1970 (R. 17a). His half-brother Andre had been arrested on many occasions, the first time was the same time as his father and later on he was arrested many times more and had disappeared. (R. 17a - 18a).

On cross examination by the Government, the Government elicited the following facts about petitioner: that his mother had come to the United States as a permanent resident in 1967 and that he, the petitioner had entered on or about January, 1971 (R. 19a - 20a) and his brother had, in addition, come to the United States approximately in 1966 or

1967. He then testified that he felt that in 1966 he had to leave Haiti as he felt insecure, but that he was chosen to remain in Haiti to look after whatever family properties were there. He then testified that he did not accompany his mother on any of the visits to the American Consulate in Haiti to obtain the visas to enter the United States (R. 21a). He stated that this was for two reasons; that he was concerned with attempting to run the bakery as best he could, and that he had been distributing fliers. In response to further questioning the petitioner stated that he had been engaged in activities, that in effect the bakery had been taken care of by someone else, an employee who took care of the business for him while he was engaged in political activities and distributing fliers against the government (R. 21a). He then testified that he came to the United States on or about the 13th of January 1970 or 1971 (the Government corrected this to 1971) (R. 22a). He then testified that approximately two or three months prior to his departure from Haiti the bakery had not operated. He testified that he had stayed

behind to get whatever he could from the properties his family had (R. 22a). He testified that he did not run the bakery, but a manager did, (R.22a). He further testified that about a year after the election (1958) the arrests of people began in Haiti (R. 23a). In response to the Government's query of why he continued to reside there through all this until 1971, he explained and reiterated that he had lived in hiding under cover, that he lived and slept in the woods, that he never slept in his own house (R. 23a), that they had not bothered his mother because his mother was an old woman. Between 1957 and 1966 or 1967 he testified that his brother had lived in a house with his wife, and that he, the petitioner, had lived up in the hills in a house; but he testified that the family had given the house to a Mr. E. Joseph who held a mortgate on his house and who had apparently foreclosed. That the bakery had been confiscated by a bank holding a mortgage on it. He further testified that after the Calle matter in 1970, he again had handed out fliers as well as during the entire period from 1957 to 1970, but only to those

he knew (R. 26a). He said that the travel document he obtained, his passport had cost him five hundred dollars and that he had paid this sum to an individual who had gotten it for him. The Government introduced the passport as being stamped by the Secretary of Interior at Port-au-Prince. Petitioner then said that the visa in the passport was stamped by the British Embassy on January 11, 1970 when he went to visit Jamaica for one week. Petitioner testified that the hotel address on his passport was false as was the address of his brother Andre Innocent. That he had put it into his passport as was required in case of an accident. He testified that he gave a man the photos so that he could have his passport issued. That these photos had been taken in 1967 or 68 or 57 or 58. He testified that his father had died on February of 1960 as a result of mistreatment in prison (R. 27a). He again testified that his father had died four months after he was released from prison (R. 28a). In response to further Government questioning the petitioner again testified that he decided to leave Haiti in 1971 after the attack on the presidential palace which had taken

place in April 1970. He further testified that whenever there was anything starting, that is by the government, any political movement, he fled and went into hiding. He stated that he paid somebody to advise him if there was anything against him and if for any reason, he was to be picked up. (R. 29a). The man who delivered money to him from the bakery was a Tonton Macoute. On reexamination by petitioner's counsel he testified as to why he could not pay the mortgages on the house and the bakery. He testified that he could not get the money he needed and nobody was going to buy it from him because he was a suspect person and no one wanted anything to do with him. And that he could not wander about trying to find people to help him raise the money. In response to a query from the Government, as to why he had not come to the United States with his brother in approximately 1966 or 1967, when he could have; he responded that he was hoping there would be another government, that he was fearing death at every moment, but did not want to leave Haiti since he was still hoping for a change (R. 31a).

The IJ then began questioning petitioner. He asked him who lived in the house between 1967 and 1971, and petitioner responded, a man named Joseph, apparently referring to the previous Joseph who had foreclosed on his house. Joseph had taken over the house about one month after his mother departed. He then testified that he had two children of a marriage from a woman he had divorced in 1960, that he had a daughter 18 years of age and a son who was married and who was at that time 25 years of age. That the mother of his son was Lourdes Duchatelier. That Ms. Duchatelier was also the mother of his 15 year old girl. That he had lived with Lourdes Duchatelier since 1941 until 1957 after the birth of his daughter. Notwithstanding this separation, he was in constant contact with this woman (R. 33a). He further testified that the son lived in Paris. At that point in the hearing, Counsel made a request for voluntary departure. The hearing shortly came to a close with the IJ noting that no further evidence had been presented on voluntary departure (R. 35a). Voluntary departure had in the alternative been granted previously at

another hearing.

The testimony at this last hearing occured subsequent to a motion to reopen filed on March 5, 1973 in which the petitioner's attorney asked to reopen the deportation hearing to apply for Sec. 243(h) relief. As part of the record in this case petitioner made sworn statements to the Service concerning his political asylum request in accordance with Sec. 1253 of the U.S. Code. This evidence was submitted as part of his political asylum request apart from the 243(h) relief and prior thereto.

On appeal to the B.I.A. petitioner's counsel argued that the IJ's decision had been arbitrary and capricious. (R. 52a)

The Government counsel argued that the burden was with the respondent and that the issue was not the veracity of the petitioner (R. 52a).

The Government further argued petitioner had advanced no reason to substantiate that fear (R. 52a).

Petitioner's counsel submitted that the difficulty of getting witnesses to corroborate the testimony of 243(h) applicants was directly attributable to the fear in the Haitian community of INS transmittal to Haiti (R. 53a).

RELEVANT STATUTES

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. § 1253

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Section 244, U.S.C. § 1254

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and-

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for

a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commision of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien

or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241 (a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Section 245, U.S.C. § 1255

Adjustment of Status of Nonimmigrant to that of person admitted for permanent residence.

(a) The status of an alien, other than an

alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immeiately available to him at the time this application is approved.

RELEVANT REGULATIONS

Title 8, Code of Federal Regulations (C.F.R.) §242.17 Ancillary matters, applications

(c) Temporary withholding of deportation. The respondent shall be advised that pursuant to Sec. 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer

that he would be subject to persecution on account of race, religion, or political opinion as claimed.

8 C.F.R. § 242.21 Appeals.

Pursuant to Part 3 of this chapter an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. An appeal shall be taken within 10 days after the mailing of a written decision, or the stating of an oral decision, or the service of a summary decision on Form I-38 or Form I-39. The reasons for the appeal shall be stated briefly in the Notice of Appeal, Form I-290A; failure to do so may constitute a ground for dismissal of the appeal by the Board. When service of the decision is made by mail, as authorized by this section, 3 days shall be added to the period prescribed for the taking of an appeal.

ARGUMENT

POINT I. The Scope of the Section 243(h) hearing was exceeded when the IJ revoked petitioner's voluntary departure, granted at an earlier hearing; a subtle coercion of petitioner to forego his appeal rights

occurred when the IJ refused to grant voluntary departure because petitioner was not ready to leave the country "immediately." (Emphasis supplied)

(a) The IJ abused his discretion with respect to the scope of the hearing.

In his decision of February 22, 1971, the IJ ordered the following:

"ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government on or before April 1, 1971,..." (R. 49a).

Later, the IJ ordered,

"That if the aforenamed country (France) advises the Attorney General that it is unwilling to accept the respondent into its territory, the case shall be remanded to me for further proceedings and the receipt of an application under Sec. 243(h) with regard to the alternate designation which is to be Haiti" (R. 50a).

On August 13, 1975, the IJ reopened proceedings for a 243(h) application pursuant to his order of February 22, 1971. In his 1975 decision he stated, "The respondent selected France in the event an order of deportation was entered, but that country has

declined to accept him." (R. 7a)

The IJ denied the 1975 request for voluntary departure because petitioner "failed to make any efforts to leave this country, although given the opportunity years ago. He will not return to Haiti, and therefore, I find him ineligible for voluntary departure as he is not ready, willing and able to leave the United States," (R. 6a)

The two decisions of the IJ taken together constitute facts sufficient to find that the IJ abused his discretion.

The IJ specifically provided that rather than proceed with a 243(h) hearing, a wait and see if France would accept the petitioner decision was rendered, subject to reopening if France would not. (R. 50a).

France would not accept the petitioner, (R. 7a) so petitioner applied for 243(h) relief and requested voluntary departure in the alternative which had in 1971 been received and without subsequent facts to indicate bad moral character under Sec. 244(e), and should have remained the alternate decision subject to the pursuit of petitioner's appellate remedies.

(b) The IJ abused his discretion when he characterized petitioner as one who "failed to make any efforts to leave this country, although given the opportunity years ago."

The IJ himself having provided for a later opportunity to apply for Sec. 243(h) relief, now complained of petitioner that he refused to leave.

The Service cannot, no more than petitioner, "blow hot and cold" with regard to administrative action. Callanan Road Improvement Co. v. United States, 345 U.S. 507, 513 (1953).

This is, in the words of the District Court in Haidar v. Coomey a "subtle coercion on the alien to forego the appeal right rather than to exercise it." 401 F. Supp. 717 (D.C. Mass. 1974), see C.F.R. 242.21

It is submitted that this procedure is a due process abuse of discretion.

POINT II. Petitioner's burden for a stay of deportation due to fear of persecution should be only to go forward with the evidence and establish clear probability of fear of persecution by a preponderance of the evidence.

In Zamora v. INS, and Noel V. INS, (Docket No. 75-4093, decided April 29, 1976) this Court cited Kordic v. Esperdy, 386 F. 2d 232, 238-39 (1967), cert. den. 392 U.S. 935 (1968), and said that the determination whether or not persecution, within the meaning of section 243(h), would actually occur in the event of deportation, was a finding of fact, distinct from the exercise of administrative discretion to stay deportation, and "must pass the substantial evidence test."

Kordic v. Esperdy, supra, citing Wong Wing Hang v. INS, 360 F.2d 715 (1966) elaborated on the standard of abuse of discretion, by stating, the denial would be an abuse of discretion of it were made without a "rational explanation, inexplicably departed from established policies or rested on an impermissible basis." Petitioner to this point has no quarrel with the Wong Court.

However, that Court also announced the "Substantial Evidence Test" which later, by way of Kordic, Zamora, and Noel, supra, landed in the Section 243(h) "hearing".

Though both decisions turned on the question of discretion, the Zamora and Noel Court classified the

243(h) adjudication as a "hearing" and indicated that findings of fact were distinct from the exercise of discretion and should be treated separately.

If 8 C.F.R. 242.17 which places the burden on the petitioner, although the statute does not, is in arguendo valid, this Court should reconsider the use of the substantial evidence test since the stakes are too high in the section 243(h) claim, and the results of lost fear of persecution claims are never tabulated.

Bearing in mind the civil nature of the proceedings, the fifth circuit in Paul v. INS 521 F.2d 197 (5th Cir. 1975) has established the preponderance of the evidence standard.

Wong dealt with the standard for denial and placed the substantial evidence test upon the Government, if, it denied, a suspension of deportation application. This in turn has been seemingly transformed into petitioner's burden in the Sec. 243(h) hearing as to the grant of relief. Except for the issue of discretion, the nature of Sec. 243(h) relief, as well as the findings, bear little resemblance

to other forms of relief before the INS. An activist who would have eluded authorities in a foreign country would then be handicapped in his proof for absence of any physical signs of torture or incarceration and family witnesses would be deemed almost certainly biased.

In Chen v. Foley, 385 F.2d 929 (1967), the Court used the standard of substantial evidence to test the Board's affirmance of a denial of adjustment of status.

Sec. 245 of the I & N Act, 8 U.S.C.A. 1255, permits the adjustment of status of nonimmigrant to that of person admitted for permanent residence.

That statute provides, in pertinent part, "the status of an alien, ... may be adjusted by the Attorney General '"A.G.") in his discretion, and under such regulations as he may prescribe,... if .....(2) the alien is eligible to receive an immigrant visa and is admissible to the U.S. for permanent residence....(Emphasis supplied).

Chen is distinguishable as a relief provision since all the conditions of entry to an immigrant obtaining a visa abroad are required of the alien

who attempts to adjust.

The provision clearly gives the A.G. authority pursuant to regulation to prescribe the conditions and the statute itself, clearly implies it.

The Section 244 (a) (1) (2) of the Act are for the same reason distinguishable from Section 243(h) since they require that the alien proves during all of the statutory period that he was and is a person of good moral character; and is a person whose deportation in the opinion of the A.G. would result in harship. This, of course, was the statute in issue in Wong, supra.

Just as Section 244(a) (1) (2) places the burden on the alien, so does Section 244(e) of the I&N Act which provides for voluntary departure in lieu of deportation if the alien "shall establish to the satisfaction of the A.G. that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this section."

In four major areas of "Service" discretion; Voluntary Departure, Adjustment of Status, Suspension of Deportation, and 243(h) stays due to claim of Persecution, three of the four set the burden on

the petitioner (respondent in the "Service") by Statute.

The omission in section 243(h) is glaring and cannot be ascribed to oversight. It is, by its absence, conspicuous and the Service has sought to fill the gap through 8 C.F.R. 242.17.

It is therefore the regulatory scope which is the issue before this Court and whether the test of substantial evidence is appropriate to the Noel, supra, findings of fact aspect of this hearing, or whether its role should be assigned to the denial of discretion by the IJ where the sole basis of denial, is the IJ's refusal to believe the testimony of the petitioner.

POINT III. Where the Immigration Judge denies a Sec. 243(h) application on the sole ground that he does not believe the applicant, substantial evidence for the denial should be required.

The IJ denied the request for asylum under section 243(h) since petitioner did not make a showing of "clear probability" of persecution.

In Cheng Kai Fu v. INS 386 F.2d 750 (1967), this Court required "some evidence" of indication

that the aliens would be subject to persecution at 753.

The Court criticized the difficulties alleged by the aliens in that case and said "those difficulties do not amount to the kind of particularized persecution that justifies a stay of deportation" at 753.

Seemingly, this criticism hinted at the guidelines for establishing a "clear probability" of persecution, that is, particularization.

In Khalil v. District Director of U.S. Immigration and Naturalization Service 457 F.2d 1276 (1976), the 9th Circuit complained of petitioner, that the evidence regarding persecution offered by Khalil consisted solely of statements made by her and Mrs. Tawfik that they believed Khalil would be persecuted. No factual support which might have demonstrated the reasonableness of this belief was offered; hence, the INS was not clearly wrong in discounting the conclusory statements of danger and determining that Khalil had failed to sustain her burden of proof, at 1278.

Just as this Circuit in Fu v. INS, supra, required particularization, so the Khalil Court in the 9th

Circuit required a factual particularization rather than mere conclusory allegations.

In the instant case, these criticism of petitioner were and are unavailable.

The IJ stated in his decision "If I were to accept the respondent's testimony at full face value, he might have satisfied the requirements of the law." (R. 7a)

The IJ denied the request because he found, as a result of alleged contradictions and the ability of petitioner to elude the grasp of Haitian Authorities, petitioner "difficult to believe."(R. 8a). He stated there was no "clear probability " of persecution.

The IJ did not cite the Petitioner for failure to particularize or for alleging merely conclusory statements.

On the contrary, petitioner in depth, went into every phase of petitioner's life in Haiti. Testimony began with his father's incarceration and subsequent death, continued to his brother's disappearance after many arrests, the dissemination of fliers to those he trusted, and his inability to operate personally the family bakery (obviously because of its required

visibility). Mention of his retreat into hiding and his panic concerning the Palace attack in 1970 were the other substantial particularizations testified to.

The IJ referred to contradictions in petitioner's testimony. From the record of the hearing, petitioner made every attempt to respond correctly concerning a twelve year period of time. It is submitted that those contradictions were not in point of fact brought out but that such statements were interpreted equivocally by the IJ to lend substance to the true reason of denial, the disbelief by the IJ of petitioner's testimony.

At the Board of Immigration Appeals, the Government Attorney denied that the basis of the IJ's decision was that he disbelieved petitioner, but simply that petitioner did not meet his burden of showing a clear probability of persecution. (R. 52a-53a).

This is simply not the case as can be seen from the IJ's decision (R. 7a). Petitioner's particularized testimony were facts sufficient to constitute a clear probability of fear of persecution.

CONCLUSION

The petition for review should be granted, a stay issued to the petitoner and in the alternative voluntary departure be granted, and such further relief as this Court may deem appropriate.

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